

<sup>3</sup> The Board notes that, following the October 22, 2020 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## **ISSUES**

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$17,560.49 intermittently from August 1, 2009 through June 22, 2019 for which he was without fault, as he concurrently received Social Security Administration (SSA) age-related retirement benefits and FECA wage-loss compensation without appropriate offset; (2) whether it properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$1,250.00 from appellant's continuing compensation payments every 28 days.

## **FACTUAL HISTORY**

On January 30, 2009 appellant, then a 62-year-old custodian, filed a traumatic injury claim (Form CA-1) alleging that on that date he sustained injuries to his sacrum, spine, head, and wrists when he slipped and fell in snow and slush when pulling a large snowblower while in the performance of duty. OWCP initially accepted the claim for sprains of the neck, wrists, and lumbar and thoracic regions of the back. It later expanded the acceptance of the claim to include lumbar spinal stenosis and left hand osteoarthritis. Appellant stopped work on January 31, 2009. OWCP paid appellant wage-loss compensation on the supplemental rolls beginning March 18, 2009 and on the periodic rolls beginning June 7, 2009.

On October 15 and November 16, 2012 OWCP forwarded to SSA Federal Employees Retirement System (FERS)/SSA dual benefits calculation forms to obtain information regarding appellant's receipt of SSA age-related retirement benefits.

On November 21, 2012 SSA completed the dual benefits calculation form, which listed appellant's SSA age-related retirement benefit rates with and without a FERS offset from August 2009 through December 2012. The form indicated that: beginning August 2009, December 2009, and December 2010, appellant's SSA rate with FERS was \$1,229.40 and without FERS was \$885.70; beginning December 2011, his SSA rate with FERS was \$1,273.70 and without FERS was \$917.50; and beginning December 2012, his SSA rate with FERS was \$1,295.30 and without FERS was \$933.10.

On December 7, 2012 OWCP prepared a FERS offset overpayment calculation worksheet wherein it noted the calculation of appellant's SSA offset overpayment from August 1, 2009 through December 15, 2012. The total overpayment was determined to be \$18,310.04. OWCP found that appellant received an overpayment of compensation in the amount of \$1,382.35 for the period August 1 through November 30, 2009; \$4,135.73 for the period December 1, 2009 through November 30, 2010; \$4,135.73 for the period December 1, 2010 through November 30, 2011; \$4,297.89 for the period December 1, 2011 through November 30, 2012; and \$4,358.34 for the period December 1 through 15, 2012.<sup>4</sup>

By letter dated December 11, 2012, OWCP notified appellant that, based on information provided by SSA regarding the amount of his age-related retirement benefits attributable to his federal service, it had adjusted his FECA wage-loss compensation and that he would receive a net payment \$2,275.26 every 28 days after the SSA offset. In a payment report for the period December 16, 2012 through January 12, 2013, it was noted that a FERS/SSA offset in the amount

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<sup>4</sup> The number of days between December 1 and 15, 2012 was incorrectly noted as 365 days.

of \$334.34 had been deducted from appellant's compensation payments. Miscellaneous deductions were noted as \$376.58. The record reflects that appellant received a net payment of \$2,609.60 every 28 days up to December 15, 2012, and then \$2,275.26 as of December 16, 2012. The record reflects that appellant received two payments of \$2,275.26 for the period December 16, 2012 to January 12, 2013. One payment was issued on the periodic rolls on January 12, 2013 and the second payment was issued on the supplemental rolls on March 1, 2013. The record also reflects that appellant received two payments of \$2,268.28 for the period January 13 through February 9, 2013. One payment was issued on the periodic rolls on February 9, 2013 and the second payment was issued on the supplemental rolls on March 1, 2013.

On May 23, 2019 OWCP provided SSA with another FERS/SSA dual benefits calculation form.

On May 30, 2019 SSA completed the dual benefits calculation form, which listed appellant's SSA age-related retirement benefit rates with a FERS offset and without a FERS offset from August 2009 through December 2018. The SSA representative noted that appellant became eligible to receive SSA age-related retirement benefits in August 2009. The form indicated that: beginning August and December 2009 and December 2010, appellant's SSA rate with FERS was \$1,229.40 and without FERS was \$880.10; beginning December 2011, his SSA rate with FERS was \$1,273.70 and without FERS was \$911.70; beginning December 2012, his SSA rate with FERS was \$1,295.30 and without FERS was \$927.20; beginning December 2013, his SSA rate with FERS was \$1,314.70 and without FERS was \$941.00; beginning December 2014 and December 2015, his SSA rate with FERS was \$1,337.00 and without FERS was \$957.00; beginning December 2016, his SSA rate with FERS was \$1,341.00 and without FERS was \$959.90; beginning December 2017, his SSA rate with FERS was \$1,367.80 and without FERS was \$979.10; and beginning December 2018, his SSA rate with FERS was \$1,406.10 and without FERS was \$1,006.40.

In a payment report for the period May 26 through June 22, 2019, miscellaneous deductions from appellant's FECA wage-loss compensation in the amount of \$25.28 were noted.

On June 24, 2019 OWCP prepared a FERS offset overpayment calculation worksheet wherein it noted the calculation of appellant's SSA offset overpayment from August 1, 2009 through June 22, 2019. The total overpayment was determined to be \$44,213.68. OWCP found that appellant received an overpayment of compensation in the amount of \$1,404.88 for the period August 1 through November 30, 2009; \$4,203.12 for the period December 1, 2009 through November 30, 2010; \$4,203.12 for the period December 1, 2010 through November 30, 2011; \$4,367.87 for the period December 1, 2011 through November 30, 2012; \$4,429.34 for the period December 1, 2012 through November 30, 2013; \$4,496.72 for the period December 1, 2013 through November 30, 2014; \$4,572.53 for the period December 1, 2014 through November 30, 2015; \$4,585.05 for the period December 1, 2015 through November 30, 2016; \$4,585.76 for the period December 1, 2016 through November 30, 2017; \$4,677.21 for the period December 1, 2017 through November 30, 2018; and \$2,688.09 for the period December 1, 2018 through June 22, 2019.

By letter dated June 24, 2019, OWCP notified appellant that, based on information provided by SSA regarding the amount of his SSA age-related retirement benefits attributable to federal service, it had adjusted his FECA wage-loss compensation and that he would receive \$2,508.31 every 28 days after the SSA offset.

In a payment report for the period June 23 through July 20, 2019, miscellaneous deductions from appellant's FECA wage-loss compensation in the amount of \$463.31 were noted.

On August 2, 2019 OWCP advised appellant of its preliminary overpayment determination that he had received an overpayment of compensation in the amount of \$44,213.68 for the period August 1, 2009 through June 22, 2019 because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without an appropriate offset. It included a FERS offset calculation sheet setting forth the claimed basis of the overpayment. OWCP determined that he was without fault in the creation of the overpayment. It requested that the employee submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a fair repayment method. OWCP requested financial information, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. It advised appellant that it would deny waiver if he failed to furnish the requested financial information within 30 days. OWCP further provided him with an overpayment action request form and notified him that within 30 days of the date of the letter he could request a telephone conference, a final decision based on the written evidence, or a prerecoument hearing.

On August 14, 2019 appellant requested a prerecoument hearing before a representative of OWCP's Branch of Hearings and Review. He contested the overpayment and submitted a completed Form OWCP-20, which delineated his income, expenses, and assets. A hearing was held on November 6, 2019.

By decision dated January 14, 2020, the hearing representative found that appellant was overpaid from August 1, 2009 through December 15, 2012. The hearing representative remanded the case, however for OWCP to recalculate the amount of overpayment, as a review of appellant's compensation payments indicated that OWCP began deducting the FERS/SSA offset from appellant's payments effective December 16, 2012. The hearing representative noted that it appeared that the offset continued from that date, and that on remand, OWCP should confirm that each time appellant's benefits were suspended, the offset continued to be applied and that OWCP should properly determine any remaining offset and the correct overpayment amount.

On January 24, 2020 OWCP prepared a FERS offset overpayment calculation worksheet wherein it explained its calculations of appellant's SSA offset overpayment from August 1, 2009 through December 15, 2012. The total overpayment amount was determined to be \$14,361.00. OWCP found that appellant received an overpayment of compensation in the amount of \$9,811.11 for the period August 1, 2009 through November 30, 2011, \$4,367.87 for the period December 1, 2011 through November 30, 2012, and \$182.03 for the period December 1 through 15, 2012.

On January 24, 2020 OWCP issued a *de novo* preliminary overpayment determination, finding that an overpayment of compensation in the amount of \$14,361.00 had been created for the period August 1, 2009 through December 15, 2012 because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without an appropriate offset. It included a copy of the FERS offset overpayment calculation worksheet setting forth the claimed basis of the overpayment. OWCP determined that he was without fault in the creation of the overpayment. It requested that the employee submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a fair repayment method. OWCP requested financial information, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. It advised appellant that it would deny waiver if he failed to furnish the requested financial information within 30 days. OWCP further provided

him with an overpayment action request form and notified him that within 30 days of the date of the letter he could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing.

On January 31, 2020 appellant requested a prerecoupment hearing before a representative of OWCP's Branch of Hearings and Review. He contested the overpayment and requested waiver of recovery as he had been found without fault in the creation of the overpayment.

On April 6, 2020 a hearing representative found that the case was not in posture for a prerecoupment hearing because, while the January 24, 2020 preliminary overpayment determination of had found an overpayment for the period August 1, 2009 through December 15, 2012, it had not made determinations of any other periods of overpayment. The hearing representative set aside the preliminary overpayment determination of January 24, 2020 and remanded the case for recalculation of appellant's full overpayment amount for the period August 1, 2009 through June 22, 2019.

OWCP reviewed the record of appellant's compensation payment history from September 23, 2012 through June 22, 2019, which included a record of miscellaneous deductions taken during that period.

On April 9, 2020 OWCP prepared a FERS offset overpayment calculation worksheet wherein it noted the calculation of appellant's SSA offset overpayment from August 1, 2009 through June 22, 2019. The total overpayment was determined to be \$17,760.49. OWCP found that appellant received an overpayment of compensation in the amount of \$9,811.11 for the period August 1, 2009 through November 30, 2011, \$4,367.87 for the period December 1, 2011 through June 30, 2012, \$182.03 for the period December 1 through 15, 2012, \$339.78 for the period January 13 through February 9, 2013, \$371.61 for the period November 2 through 30, 2018, and \$2,688.09 for the period December 1, 2018 through June 22, 2019.

On April 9, 2020 OWCP issued a preliminary overpayment determination finding that an overpayment of compensation in the amount of \$17,760.49 has been created because appellant concurrently received FECA wage-loss compensation and SSA age-related retirement benefits based upon his federal service, without appropriate offset. It provided calculations for the following periods of overpayment based on the FERS/SSA offset: August 1, 2009 through November 30, 2011; December 1 through November 30, 2012; December 1 through 15, 2012; January 13 through February 9, 2013; November 2 through 30, 2018; and December 1, 2018 through June 22, 2019. OWCP determined that he was without fault in the creation of the overpayment. It requested that the employee submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a fair repayment method. OWCP requested financial information, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. It advised appellant that it would deny waiver if he failed to furnish the requested financial information within 30 days. OWCP further provided him with an overpayment action request form and notified him that within 30 days of the date of the letter he could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing. On April 24, 2020 appellant requested a prerecoupment hearing before a representative of OWCP's Branch of Hearings and Review. He requested waiver of recovery of the overpayment as he was without fault in the creation of the overpayment. By letter dated August 7, 2020, appellant's then-counsel requested that the hearing request be converted to a request for review of the written record.

In a Form OWCP-20 dated August 25, 2020, appellant indicated that he had a total monthly income of \$5,067.98 and listed total monthly expenses of \$3,177.08. He advised that he had \$150.00 in cash, a checking account balance of \$61,615.83, a savings account balance of \$54,795.86, and a Thrift Savings Plan account balance of \$199,755.42, for total funds of \$316,317.11. Appellant submitted financial documentation in support of his reported income, expenses, and assets.

By decision dated October 22, 2020, OWCP's hearing representative finalized the preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$17,560.49 because OWCP failed to offset his compensation payments by the portion of his SSA age-related retirement benefits that were attributable to his federal service for the following periods: August 1, 2009 through November 30, 2011; December 1 through November 30, 2012; December 1 through 15, 2012; January 13 through February 9, 2013; November 2 through 30, 2018; and December 1, 2018 through June 22, 2019. The hearing representative further found that appellant was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment because the evidence of record failed to establish that recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience. The hearing representative noted that appellant's monthly discretionary income of over \$1,800.00 and sufficient cash assets were sufficient to repay the debt in full. The hearing representative found that OWCP would recover the overpayment by deducting \$1,250.00 every 28 days from appellant's continuing compensation payments.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.<sup>5</sup> Section 8116 limits the right of an employee to receive compensation. While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.<sup>6</sup>

Section 10.421(d) of the implementing regulations requires that OWCP reduce the amount of compensation by the amount of SSA age-related retirement benefits that are attributable to federal service of the employee.<sup>7</sup> FECA Bulletin No. 97-09 provides that FECA benefits have to be adjusted for the FERS portion of SSA benefits because the portion of the SSA benefit earned as a federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.<sup>8</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation intermittently from August 1, 2009 through June 22, 2019 for which he was

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<sup>5</sup> 5 U.S.C. § 8102(a).

<sup>6</sup> *Id.* at § 8116.

<sup>7</sup> 20 C.F.R. § 10.421(d); *see L.W.*, Docket No. 19-0787 (issued October 23, 2019); *S.M.*, Docket No. 17-1802 (issued August 20, 2018).

<sup>8</sup> FECA Bulletin No. 97-09 (February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

without fault, as he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation without appropriate offset.

The record indicates that, while appellant was in receipt of wage-loss compensation under FECA, he also intermittently received SSA age-related retirement benefits attributable to federal service without appropriate offset. As previously noted, OWCP is required to reduce the amount of compensation by the amount of any SSA age-related retirement benefits that are attributable to the employee's federal service.<sup>9</sup> Fact of overpayment has, therefore, been established.

The Board further finds, however, that the case is not in posture for decision with regard to the amount of the overpayment. On remand from the April 6, 2020 hearing representative decision OWCP recalculated the overpayment. The total overpayment was determined to be \$17,760.49. OWCP found that appellant received an overpayment of compensation in the amount of \$9,811.11 for the period August 1, 2009 through November 30, 2011, \$4,367.87 for the period December 1, 2011 through June 30, 2012, \$182.03 for the period December 1 through 15, 2012, \$339.78 for the period January 13 through February 9, 2013, \$371.61 for the period November 2 through 30, 2018, and \$2,688.09 for the period December 1, 2018 through June 22, 2019. However, it did not fully explain how it determined the intermittent periods and calculated the amounts.

A claimant is entitled to an overpayment decision that clearly explains how the amount was calculated.<sup>10</sup> The Board finds that the overpayment decision in this case does not provide such an explanation. Therefore, the amount of overpayment has not been established.

On remand OWCP shall explain how it determined the intermittent periods and prepare detailed calculations setting forth the corresponding amounts of overpayment. Following this and other such further development as deemed necessary OWCP shall issue a *de novo* preliminary overpayment determination.<sup>11</sup>

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation, for which he was without fault, as he concurrently received Social Security Administration (SSA) age-related retirement benefits and FECA wage-loss compensation benefits without appropriate offset. The Board further finds that the amount of the overpayment is not in posture for decision.

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<sup>9</sup> *Id.*; *supra* note 7.

<sup>10</sup> See *L.J.*, Docket No. 19-0800 (issued October 17, 2019); *A.J.*, Docket No. 18-1152 (issued April 1, 2019); *J.W.*, Docket No. 15-1163 (issued January 13, 2016); *O.R.*, 59 ECAB 432 (2008) with respect to overpayment decisions, OWCP must provide clear reasoning showing how the overpayment was calculated); see *Jenny M. Drost*, 56 ECAB 587 (2005) (to comply with OWCP's overpayment procedures, an overpayment decision must contain a clearly written explanation indicating how the overpayment was calculated).

<sup>11</sup> In light of the Board's disposition of Issue 1, Issues 2 and 3 rendered moot.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 22, 2020 decision of the Office of Workers' Compensation Programs is affirmed in part, and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: January 6, 2022  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board